Supreme Court, U. S.
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No. 75-1000

In the

Supreme Court of the United States

October Term, 1975

HAROLD A. BOIRE, REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

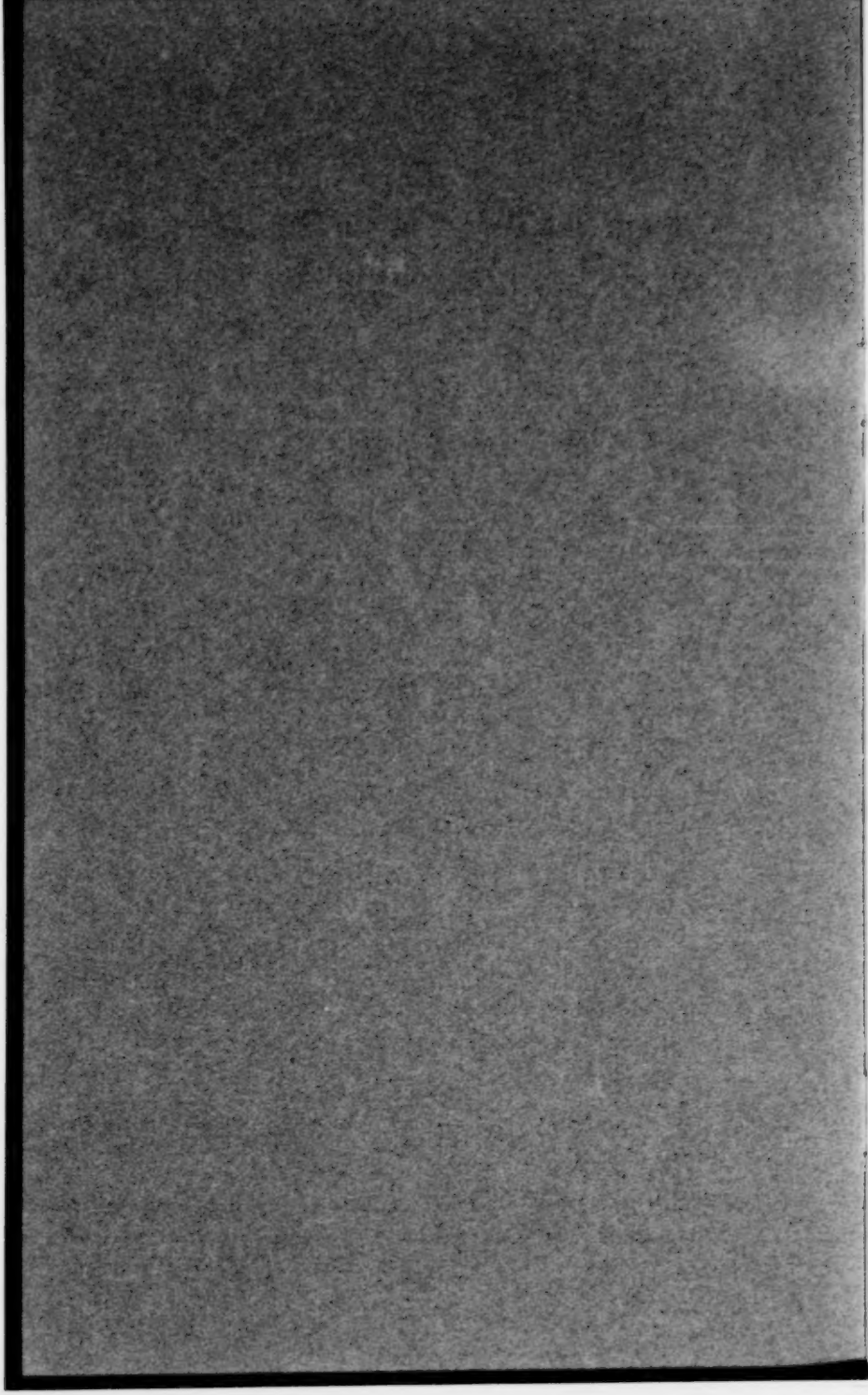
PILOT FREIGHT CARRIERS, INC., ET AL.,
Respondents

RESPONSE OF TEAMSTERS LOCAL 512 TO SUPPLEMENTAL MEMORANDUM OF PETITIONER

Respectfully submitted,

DAVID PREVIANT
6th Floor, Midland Bank Bldg.
211 W. Wisconsin Avenue
Milwankee, Wisconsin 53203
(414) BR 1-4500

L. N. D. WELLS, JR.
Suite 200
8204 Elmbrook Drive
Dallas, Texas 75247
(214) 630-3672



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RESPONSE OF TEAMSTERS LOCAL 512 TO SUPPLEMENTAL MEMORANDUM OF PETITIONER

Pursuant to the Court's letter of May 3, 1976, inviting response to the Government's Memorandum of April 17, 1976, we advise the Court:

The petition poses the question as to a district court's power under § 10(j) of the Act to require by interim order that an employer bargain with a union, where that court has found a showing of union majority and reasonable cause to believe that the employer has committed a number of serious unfair labor practices so as to preclude the holding of a fair election.

We oppose Petitioner's suggestion that the question has become moot.

The petitioner suggests mootness solely by reason of the issuance of an Order by NLRB on March 25, 1976,

requiring the respondent employer to bargain, reinstate an employee, and cease and desist from its law violations.

The employer continues to refuse to comply. As recently as May 10, 1976, the employer has again refused to bargain. Specifically, the employer advised:

> As you know, we have always maintained that we have no dock employees at Jacksonville, Florida. Furthermore, we have an agreement with your union that the dispute will be resolved by a final order of the National Labor Relations Board. The current order of the Board is not final and will not be final until it has been reviewed by the U.S. Court of Appeals of the 5th Circuit.[1]

1.

So it is clear that the case is not factually moot. Indeed, the employer who since 1971,[2] has been avoiding the responsibility to bargain, is continuing to refuse to bargain, despite his reiterated acknowledgment of his prior agreement to comply with the NLRB's final Order.

The Board's March 25, 1976 Order is final.[3] But Pilot will not acknowledge that fact, and refuses to comply with

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[1] Pilot's letter of May 10, 1976, from which we have quoted a portion is appended hereto, at p. A-1, *infra*.

[2] See *Pilot Freight Carriers, Inc.*, 208 NLRB 853 at 858; *Boire* v. *Intl. Brhd. of Teamsters*, 479 F.2d 778 (5th Cir. 1973); *Pilot Freight Carriers* v. *Local 560*, 373 F.Supp. 19 (D.C. N.J., 1974) and companion cases listed at 373 F.Supp. 27-28. See also *Local 391* v. *Pilot Frt. Carriers*, 497 F.2d 311 (4th Cir. 1974), cert. den. ..... U.S. .....

[3] Act, § 10(g) provides:

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

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the statute, or the Order.

Pilot's assertion that its dock workers are "independent contractors" and not "employees," has been thrice denied. In *Pilot Freight Carriers, Inc.*, 208 NLRB 853 (1974)[4] the Board found them to be employees. Again, in 1975, Administrative Law Judge Saunders found them to be "employees,"[5] and that ruling was affirmed in the Board's Order of March 25, 1976.[6] Yet Pilot continues to maintain: ". . . we have no dock employees . . ." and thus to refuse to bargain.

Section 10(j) of the Act was enacted to prevent just such charade. For five years from 1971-1976 Pilot has utilized the procedures of the Act to evade it. Findings of the district court, and multiple determinations before NLRB, that these workers are "employees," entitled to the protection of the Act, do not become "moot" merely upon the issuance of another "order" which Pilot advertises it will flout!

2.

Section 10(j) of the Act was adopted to preclude the very scheme which Pilot here follows. Experience had shown, by 1947, when the Taft-Hartley amendments (including § 10(j)) were added that the procedures of the Board were frequently too slow to achieve the statutory objective of "prompt elimination of the obstructions to the free flow

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[4] This determination was made upon a sixty-volume record, recording hearings which were held in Tampa from May 1972 until March 1973, in which the employee status was meticulously demonstrated. See NLRB Case 12-UC-21, et al, 208 NLRB 853 at 856.

[5] See Appendix to Petition at p. 50a-60a.

[6] 223 NLRB #41, reprinted as Appendix to Petitioner's Supplemental Memorandum, at pp. 1a-8a.

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of commerce and encouragement of the practice and procedure of free and private collective bargaining." The Congress understood that the Board was ineffective in correcting unfair labor practices where "persons violating the Act . . . accomplish their illegal objective before being placed under any legal restraint . . ."[7]

Accordingly, § 10(j) was added, providing for "appropriate temporary relief."[8]

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[7] S.Rep. No. 105, 80th Cong., 1st Sess., p. 27 (1947):

Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.

[8] § 10(j) in its entirety provides:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

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Significantly, § 10(j) did not limit the time during which the injunctive relief would be operative. The duration of the injunction is left, insofar as the literal terms of the Act specify, to the discretion of the issuing court.

3.

The Taft-Hartley 1947 amendments also added proscriptions against specified acts of secondary union activity, i.e., as defined in the new §§ 8(b)(4); 8(e) and 8(b)(7); and provided in § 10(l) for temporary injunction against such activities "pending the final adjudication of the Board with respect to the matter."[9]

4.

The suggestion of mootness here is based upon the assertion (memo, p. 3) that "Congress presumably intended injunctions issued under § 10(j) to have the same limited duration as those issued under § 10(l)." We believe that

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[9] § 10(l) in pertinent part provides:

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

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presumption to be unwarranted.

(a)

In the first place, the literal language of the statute is significantly different. The traditional unfair labor practice—that which has been unlawful for the forty years since the Wagner Act became law—had not been adequately controlled. So injunctive relief was to be available promptly to achieve the statutory objective of "the encouragement of the practice and procedure of free and private collective bargaining." The injunction, as specified in § 10(j), was to provide "appropriate temporary relief." Its duration was left to the issuing tribunal.

But more precise language was used in § 10(l) providing for injunctive relief from the newly defined [10] unlawful boycott activities. While these in their secondary aspects were made unlawful, it must have been recognized, as the Courts have frequently since noted,[11] that broad proscription of secondary activity often infringes upon lawful, indeed, protected primary activities. Accordingly, if injunction of unlimited duration barring secondary activities could interfere with protected primary rights, its duration should not extend beyond "the final adjudication of the Board with respect to the matter."

Thus viewed, the difference in the literal terms of §§ 10(j) and 10(l) becomes significant. For even granting that these

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[10] §§ 8(b)(4); 8(e) and 8(b)(7) were all added at the time 10(j) and (1) were added, as part of the 1947 Taft-Hartley Amendment.

[11] *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665; *Electrical Workers Local 761* v. *NLRB*, 366 U.S. 667; *Carrier Corp.* v. *NLRB*, 376 U.S. 492.

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sections "were companion amendments to the Act and embody a similar legislative purpose" (memo, p. 3), i.e. that there was a common purpose in providing a form of injunctive relief—the duration where protecting against traditional unfair practices which hit at the heart of the statute was not limited. But the bar on newly proscribed and imprecisely defined practices was to be of more limited duration, since the ban might chill the exercise of protected rights.

(b)

Neither *Sears Roebuck*,[12] nor *Samoff*,[13] cited by the Government, deal with § 10(j). In *Sears*,[14] the parties' concessions; the language of section 10(l); and the policies requiring a post-decision examination of the propriety of continued temporary relief in the narrow area where injunction against "secondary" activity may unduly infringe legitimate § 7 (and even constitutional) "primary" rights; may all combine to support the view that the § 10(l) injunction is of limited duration.[15]

But in the case at bar, the language of the statute, and the policies of effective elimination of traditional illegal labor practices point to a different result—i.e., injunctive relief against employers who utilize NLRB delays to deny the very rights which the Act purports to guarantee.

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[12] *Sears Roebuck* v. *Carpet Layers, etc.*, 397 U.S. 655.

[13] *Building, etc. Trades, etc.* v. *Samoff*, 414 U.S. 808.

[14] Similarly, *Samoff* dealing only with § 10(1), is not determinative as to § 10(j).

[15] With, of course, the Board's access to the Circuit Court "for appropriate temporary relief or restraining order" from the appellate court, if the facts then warrant. See 29 U.S.C. § 160(e).

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Finally, *McLeod* v. *General Electric*, 385 U.S. 533, does not point to a mootness determination here. While *McLeod* involved § 10(j)—it held only that where, during the pendency of a claim of failure to bargain, the parties had entered into a new collective agreement, the question of mootness should be determined in the first instance by the district court, and the case was remanded for that purpose.

Here Pilot makes no claim of mootness by reason of an intervening collective agreement. To the contrary, Pilot says: We have no employees—we will not bargain.

To reassert the very refusal which has continued the controversy for five years is not to moot it!

WHEREFORE, we respectfully urge that the case is not moot, certiorari should be granted, and the issue presented in the petition for certiorari should be decided by this Court.

Respectfully submitted,

DAVID PREVIANT
6th Floor, Midland Bank Bldg.
211 W. Wisconsin Avenue
Milwaukee, Wisconsin 53203
(414) BR 1-4500

L. N. D. WELLS, JR.
Suite 200
8204 Elmbrook Drive
Dallas, Texas 75247
(214) 630-3672

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APPENDIX

Reply to: Post Office Box 6764
Jacksonville, Florida 32205

May 10, 1976

CERTIFIED MAIL, Return Receipt
Requested No. 852626

Mr. James H. Wheeler
Secretary-Treasurer
International Brotherhood of Teamsters, Chauffeurs,
Warehousemen & Helpers of America
Local 512
10478 Atlantic Boulevard
Jacksonville, Florida 32211

Dear Mr. Wheeler:

As you know, we have always maintained that we have no dock employees at Jacksonville, Florida. Furthermore, we have an agreement with your union that the dispute will be resolved by a final order of the National Labor Relations Board. The current order of the Board is not final and will not be final until it has been reviewed by the U.S. Court of Appeals of the 5th Circuit.

The matter is now being prepared for presentation to that court. We trust you will abide by the agreement and not get your union and our company involved in another unnecessary economic war.

Yours very truly,

PILOT FREIGHT CARRIERS, INC.
/s/ H. Z. Miller
Regional Manager

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